92-1048

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NO. _____

ROBERT MAHONY,
As father and personal representative of
EVE MAHONY,
In his own behalf and as next of kin and for the use and benefit of Eve Mahony's mother,
BARBARA MAHONY,
Petitioner,

VS.

CSX TRANSPORTATION, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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64 pp

QUESTION PRESENTED

1. WHETHER THE COMMON-LAW RULE WHICH REQUIRES A RAILROAD TO REDUCE ITS SPEED IN A HAZARDOUS AREA IS PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT WHICH SETS FORTH ONLY MINIMUM SAFETY REQUIREMENTS AND INVITES STATE REGULATIONS WHERE THERE IS A LOCAL SAFETY HAZARD AND A UNIFORM RULE IS IMPRACTICAL?

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VS.

CSX TRANSPORTATION, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered July 20, 1992 on the issue of Federal preemption of the State Common Law requirement that a train travel at a reasonable and prudent speed.

TABLE OF CONTENTS

Questions Presented i

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved 1

Statement of the Case 3

Reasons for Granting Petitioner's Writ 5

A. The issue of speed is clearly within the two savings clauses written into the legislature by Congress 6

B. The Legislative history reveals that Congress' concern with train speed was directed at that train speed within which the train might safely travel to avoid a derailment 7

C. The Eleventh Circuit's ruling conflicts with this Court's analysis in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 10

D. Congress' failure to establish a method by which injured citizens of the United States could be compensated further indicates their lack of intent to deprive those citizens of their common-law state court actions 14

Conclusion 18

Certificate of Service.....19

Attachment A - Opinion of the Court of Appeals (966 F. 2d 644).....1a

Attachment B - Judgment of the District Court.....12a

Attachment C - Order of the Court of Appeals.....14a

Attachment D - Memorandum and Order of District Court, (No. 89-0-513 D.C. Neb. 6/27/90).....16a

Attachment E - Memorandum Opinion and Order of the District Court (No. CV 90-0-140, U.S. Dist. Ct., Neb. Dist. 11/1/91).....30a

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Cipollone v. Liggett Group, Inc.,
112 S. Ct. 2608 (1992) — 10, 12, 13, 15, 16, 17

CSX Transportation, Inc. v. Easterwood,
112 S. Ct. 3024, 933 F. 2d 548 (1992) — 6

Easterwood v. CSX Transportation, Inc.,
742 F. Supp. 676 (N.D. Ga. 1990) — 5, 8, 17

English v. General Electric Co.,
496 U.S. 86, 110 S. Ct. 2270, 110 L.Ed.2d 65 (1990) — 16, 17

Florida Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) — 8

Goodyear Atomic Corp. v. Miller, 486 U.S. 174,
108 S. Ct. 1704, 100 L. Ed. 2d 158 (1988) — 16

McDermott v. Wisconsin, 228 U.S. 115,
33 S. Ct. 431, 57 L. Ed. 754 (1913) — 13

Silkwood v. Kerr-McGee Corp., 464 U.S. 238,
104 S. Ct. 615, 78 L. Ed. 2d 443 (1984) — 11, 16, 17

UNITED STATES COURT OF APPEALS

Missouri Pacific R.R. v. Railroad Comm'n., 833 F. 2d
570 (5th Cir. 1987) — 8

DISTRICT COURT OPINIONS

Carson v. Burlington Northern Railroad, No. 89-0-513
(D.C. Neb. 7/5/90 unpublished) — 11

Duester v. Burlington Northern Railroad, No. CV 90-0-140 (U.S. Dist. Ct., Neb. Dist. 11/1/91) 11

Sisk v. National Railroad Passenger Corp., 647 F. Supp. 861 (Kan. 1986) 11

Southern Pacific Transp. Co. v. Public Utilities Comm'n., 647 F. Supp. 1220 (N.D. Cal. 1986) 7

STATE DECISIONS

Florida East Coast Railway v. Griffin, 566 So 2d. 1321 (Fla. App. 1990) 11, 14

Yee v. City of Escondito, 274 Ca. Rptr. 551 (Cal. App. 4 Dist. 1990) 14

STATUTES AND CONSTITUTIONAL PROVISIONS

Article VI, Clause 2, United States Constitution 1

45 U.S.C. Section 421 2, 15

45 U.S.C. Section 434 2, 6, 7, 15

FEDERAL REGULATIONS

23 C.F.R. 646.208 15

23 C.F.R. 646.210 15

49 C.F.R. 213.1 2, 6, 9

49 C.F.R. 213.53 9

49 C.F.R. 213.55 9

49 C.F.R. 213.63 9

49 C.F.R. 213.109 (c) 9

49 C.F.R. 213.115 9, 10

OPINIONS BELOW

The opinion of the Court of Appeals dated July 20, 1992 is attached hereto as Exhibit A. The opinion of the District Court is attached hereto as Exhibit B. The Order of the Court of Appeals for the Eleventh Circuit dated September 15, 1992, denying Respondent's petition for rehearing and suggestion for rehearing en banc is attached here to as Exhibit C.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered July 20, 1992. A petition for rehearing filed by Respondent herein, was denied on September 15, 1992. This Petition for Certiorari is filed within the time allowed by S. Ct. R. 13. This Court's jurisdiction is invoked under 28 U.S.C.A. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution states in Article VI, Clause 2 "This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof... shall be the supreme law of the Land;"

Section 101 of the Federal Railroad Safety Act,

45 U.S.C. Sec. 421, provides:

> The Congress declares that the purpose of this Act is to promote safety in all areas of the railroad operations and to reduce railroad related accidents, and to reduce deaths and injuries to persons, and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

Section 205 of the Federal Railroad Safety Act,

45 U.S.C. Sec. 434, provides:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Section 213.1 of the Code of Federal Regulations,

49 C.F.R. 213.1, provides:

> This part describes initial minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements of this part, may require remedial action to provide for safe operations over that track.

STATEMENT OF THE CASE

A. Procedural Background

The underlying case is a wrongful death action for recovery of damages for the death of Eve Mahony which occurred on January 23, 1987. The original action was filed by the decedent's parents in the United States District Court for the Northern District of Georgia on January 20, 1988. The District Court's jurisdiction was invoked under diversity of citizenship. The defendant filed an answer to the complaint on February 16, 1988. The issue of preemption was not raised by the defendant until it filed a motion for summary judgment on December 4, 1989. The case was tried and concluded on September 20, 1990, with the restricted proof being submitted to the jury which returned a verdict for the defendant.

Mr. and Mrs. Mahony filed their Notice of Appeal to the Eleventh Circuit Court of Appeals which, on July 20, 1992, upheld the District Court's finding that the question of whether the defendant failed to travel at a safe and prudent speed was preempted by the Federal Railroad Safety Act and reversed the District Court on the theory of liability relating to the inadequacy of railroad grade crossing which had also been held to have been preempted by the District Court. The 11th Circuit correctly held

that the Mahony's claim that the Railroad failed to maintain a safe crossing was not preempted by the Federal Railroad Safety Act and remanded the case for a new trial.

The Defendant, CSX, filed a motion for rehearing and suggestion for a hearing en banc on August 10, 1992 which was denied by the 11th Circuit on September 15, 1992.

B. Factual Background

Eve Mahony, the daughter of the petitioners, became a nursing student at the Wildwood Hospital and Lifestyle Center in Wildwood, Georgia beginning in August, some six months prior to her death on January 23, 1987. Weather conditions on the date of Miss Mahony's death were extreme, with high winds and several inches of snow, which had left ice on the double set of tracks.

Petitioners contended that the train speed at the time of the accident was negligently set by the railroad at 35 m.p.h., having been previously raised in 1983 from 30 m.p.h. This crossing is situated so that Miss Mahony had a very short sight distance to the train which approached from a steep mountain incline around a sharp curve which intersected the track at a crossing frequently used by students and the school children of

married students. Miss Mahony was returning toward the school facing into the sun, crossing the frozen track with the wind across her toward the train when she was struck within seconds of the point in time and place at which the train would become visible.

REASONS TO GRANT PETITIONER'S WRIT

Mahony requests the grant of this petition for certiorari in order to preserve their rights on the speed issue which the petitioners contend was erroneously decided by the United States Court of Appeals, Eleventh Circuit.

On June 20, 1991, a separate panel of the United States Court of Appeals, Eleventh Circuit affirmed in part and reversed in part the judgment of the District Court in *Easterwood v. CSX Transportation, Inc.*, 742 F. Supp. 676 (N.D. Ga. 1990) on the same federal preemption defenses as are at issue here.

In ruling on the *Mahony* case, the 11th Circuit determined that it was bound by the *Easterwood* panel's decision and rendered a judgment in accordance with *Easterwood's* ruling on preemption.

On June 29, 1992, the United States Supreme Court granted the petition and cross petition for certiorari filed in *Easterwood* and agreed to review both the preemption holdings therein. *CSX*

Transportation, Inc. v. Easterwood, 112 S. Ct. 3024, 742 F. Supp. 676, 933 F. 2d 548 (1992). Oral argument is expected for either December, 1992 or January, 1993.

A. The issue of speed is clearly within the two savings clauses written into the legislature by Congress.

Section 205 of the Federal Railroad Safety Act,

45 U.S.C. Sec. 434, provides:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard *covering the subject matter* of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. (Emphasis added)

Section 213.1 of the Code of Federal Regulations,

49 C.F.R. 213.1, provides:

> This part describes initial minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the

requirements of this part, may require remedial action to provide for safe operations over that track.

B. The Legislative history reveals that Congress' concern with train speed was directed at that train speed within which the train might safely travel to avoid a derailment.

The legislative history of this legislation provides no direct guidances as to the meaning of the term "covering the subject matter." However, as Judge Schwarzer has pointed out, the "primary purpose" of the Railroad Safety Act "was 'to promote safety in all aspects of rail operations.' " *Southern Pacific Transp. Co. v. Public Utilities Comm'n.*, 647 F. Supp. 1220, at 1225 (N.D. Cal. 1986) (quoting H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104). In light of this overriding purpose, it makes no sense to read Section 434 as a broad railroad protection provision that immunizes railroads from state regulation of any aspect of their operations, no matter how dangerous, once the Secretary of Transportation has done anything affecting that same aspect of operations for any reason. To the contrary, Section 434 of the Federal Railroad Safety Act plainly "manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted." *Ibid.* Accordingly, as Judge Schwarzer recognized, " state and federal regulations cannot be held to cover the same subject

matter unless they address the same safety concerns." *Ibid.* Similarly, Judge Jones has held on behalf of the Fifth Circuit that a state regulation that addresses a hazard "not specifically covered by FRA regulations" and that does not "impair FRA's superintendence of that field" is not preempted under Section 434, even if it may be said to address the same "subject matter," broadly defined, as the federal regulations. *Missouri Pacific R.R. v. Railroad Comm'n*, 833 F. 2d 570, 575 n.5 (5th Cir. 1987).

Contrary to the Eleventh Circuit's conclusion in *Easterwood*, which was applied in this case, (933 F. 2d at 1554), in the case of *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), the Court rejected the argument that because the state regulations at issue had the same purpose as certain federal regulations, the state regulations necessarily were preempted. The Court explained that "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Id.* at 142. Here, there can be no question that the state common law duty to use reasonable speeds does not interfere with federal superintendence of the maximum speeds for specific classes of track. (Emphasis

supplied)

The Trial Court and the Court of Appeals erred in the blanket application of the preemption doctrine. Having determined that speed was addressed in the FRSA, 49 C.F.R. Section 213.1, the Court then, without further analysis, barred from the jury the admission of any testimony which was offered at trial that would have clearly illustrated and explained to the jury the relationship between speed and an adequate warning to one attempting to cross the tracks. The court's ruling ignored the fact that the unmistakable function of the speed regulations (which aptly appear in the part of the Code of Federal Regulations entitled "Track Safety Standards") is to minimize derailments by setting forth the maximum speed that trains may use on each of the six classes of track. The regulations provide several criteria that a segment of track must meet to be included within a particular class. *See e.g.*, 49 C.F.R. Section 213.53 (specifying minimum and maximum gage for each class of track); *Id.* Section 213.55 (specifying maximum deviation from uniformity of alignment for each class of track); *Id.* Section 213.63 (specifying various track surface requirements for each class of track); *Id.* Section 213.109(c) (specifying required number of cross-ties per 39-foot segment of track for each class of track); *Id.* Section 213.115

(specifying maximum permissible mismatch of rails at joints for each class of track.)

These criteria relate to stability, strength, and other quality factors and have nothing to do with the factors used to determine the safety at a rail highway grade crossing; such as the proximity of the track, volume of motor vehicles crossing, grade, weather conditions, or other conditions that might warrant a reduced speed.

C. The Eleventh Circuit's ruling conflicts with this Court's analysis in Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992)

Application of the *Cipollone* decision to the issue here will result in a denial of preemption.

In the present case, the Secretary of Transportation has adopted a rule which allows a train to travel no more than 60 miles per hour on a class four track. The State common-law requires that a train reduce its speed when a reasonable man would do so. There is no conflict between these two standards. The railroad companies can easily comply with both the federal and the state standard. For example, if the State were to require the Railroad to travel no *slower* than 70 miles per hour through its borders and Federal law set a maximum speed of 60, the Railroad could not

comply with both, and the State law would be preempted. These two requirements are not incompatible *Florida East Coast Railway v. Griffin*, 566 So.2d. 1321 (Fla. App. 1990), *Sisk v. National Railroad Passenger Corp.*, 647 F. Supp 861 (Kan. 1986), *Carson v. Burlington Northern Railroad*, No. 89-0-513 (D.C. Neb. 6/27/90 unpublished), *Duester v. Burlington Northern Railroad*, No. CV 90-0-140 (U.S. Dist. Ct., Neb. Dist. 11/1/91 unpublished). The above cases noted the speed limits set by the Secretary to be maximum limits only, not necessarily a speed that is safe. *Id.* There is nothing in the Federal law which requires a train to travel 60 miles per hour on a class four track.

As in the case of gate arms, if the FRSA has as its stated purpose to promote safety and reduce railroad related accidents then "Certainly it was not the intent of the act to insulate the railroad from liability for specific tortious acts in the face of hazardous conditions" *Florida East Coast Railway v. Griffin*, 566 So.2d. 1321 (Fla App. 1990). To disallow a common-law claim for a train's failure to reduce its speed would be issuing a license to the railroad to kill as many people as they please with no fear of liability. This Court held in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984) that Congress assumed that traditional principals of State tort law would apply

with full force unless they were expressly supplanted.

This Court's in-depth analysis of the application of preemption in the *Cipollone* case resulted in the opposite application of the preemption doctrine, and the *Cipollone* court has directed that the lower courts apply a preemption analysis which requires the trial courts to assume first the presumption against preemption and then to narrowly construe the precise language of the statute and look to each of petitioner's common law claims to determine whether it is in fact preempted. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

The *Cipollone* Court, stated that:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S., at 505, 98 S. Ct., at 1190, *"there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 107 S. Ct. 683, 690. (Emphasis supplied)
>
> Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. ...Therefore, we need only identify the domain expressly pre-empted...
>
> Beyond the precise words..., we must construe these provisions in light of the presumption against the pre-

> emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading ...
>
> ...does not by its own effect foreclose additional obligations imposed under state law.

See *McDermott v. Wisconsin*, 228 U.S. 115, 131-132, 33 S. Ct. 431, 434-435, 57 L. Ed. 754 (1913).

As stated in *Cipollone*, the test is whether there is "inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions." Applying the same test, pre-emption does not apply in the case at hand.

In the *Cipollone* case, Justices Blackmun, Kennedy and Souter, who joined the opinion, concurring in the judgment in part and dissenting in part, reiterated that:

> Our precedents do not allow us to infer a scope of pre-emption beyond that which clearly is mandated by Congress' language. In my view, neither version of the federal legislation at issue here provides the kind or unambiguous evidence of congressional intent necessary to displace state common-law damages claims.
>
> The Court's task is one of statutory interpretation — only to 'identify the domain expressly pre-empted' by the provision.

The considerations before this court are the very limited purpose taken into consideration by the legislature when track speeds were enacted.

Narrowly stated, the issue is whether the Secretary's maximum speed regulations preempt the state common law duty to travel no faster than is reasonable under the circumstances. Although there does not appear to be a conflict among the courts of appeals on this issue, there plainly is substantial confusion among the lower courts. The Eleventh Circuit's holding is in tension with a holding of a Florida appellate court that the federal speed limits do not preempt claims that trains have a duty to reduce speed in the face of a "dangerous condition or event." *Florida East Coast Ry. Co. v. Griffin*, 566 So. 2d 1321, 1324 (Fla. Dist. Ct. App. 1990). Because cases arising in Florida could be subjected to different rules depending on whether they are pursued in federal or state court, certiorari is particularly warranted. *See Yee v. City of Escondito*, 274 Cal. Rptr. 551 (Cal. App. 4 Dist. 1990).

D. Congress' failure to establish a method by which injured citizens of the United States could be compesated further indicates their lack of intent to deprive those citizens of their common-law state court actions.

The survival of the common law actions are not in conflict with the stated purpose of the Congress.

First, because verdicts are paid by railroads they do not divert resources from any planned improvements by state or local agencies, which are funded principally through federal monies pursuant to 23 C.F.R. Section 646.208 which exempts railroads from contribution at 23 C.F.R. Section 646.210, nor do the verdicts alter any other part of the statutory scheme.

23 C.F.R. Section 646.208 provides "Federal-aid funding for projects which involve the elimination of hazards of railroad-highway crossings may, at the option of the State, be provided through one of the following alternative methods, within the qualifications prescribed for each: (1) "G" funding, as provided by 23 U.S.C. 120 (d) and 130;..."

23 C.F.R. Section 646.210 provides "State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects."

Second, the stated purpose of the legislation at 45 U.S.C. Section 421 and 434 clearly leaves room for state law actions which are not, as Justice Blackmun correctly points out in *Cipollone*, directives for achieving the safety purpose of the legislation. Justice Blackmun, speaking in the *Cipollone* opinion, states:

> The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages by its very nature attaches additional consequences to *2628 the manufacturer's continued unlawful conduct, no particular course of action is required. A manufacturer found liable on, for example, a failure-to-warn claim may respond in a number of ways. It may decide to accept damages awards as a cost of doing business and not alter its behavior in any way. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186, 108 S. Ct. 1704, 1712-1713, 100 L. Ed. 2d 158 (1988) (Corporation "may choose to disregard state safety regulations and simply pay an additional " damages award if an employee is injured as a result of a safety violation). Or, by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs.

The speed of trains is controlled by the railroad in alternate ways. The timetable speed set by the railroad can be varied by special orders and bulletins. Justice Blackmun reminds the court of cases in which the court has:

> ...distinguished for purposes of pre-emption analysis, "direct state regulation" of safety matters from "the incidental regulatory effects" of damages awarded pursuant to a state workers' compensation law. [*Goodyear Atomic Corp. v. Miller*,] 468 U.S., at 185, 108 S. Ct. at 1712. Relying in part on its earlier decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S. Ct. 615, 625, 78 L. Ed. 2d 443 (1984), [FN4] the Court stated that *2629 "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." 486 U.S., at 186, 108 S. Ct., at 1712. Even more recently, the Court declined in *English v. General Electric*

Co., 496 U.S., at 86, 110 S. Ct., 2270, 110 L.Ed.2d 65 (1990) to find state common-law damages claims for emotional distress pre-empted by federal nuclear energy law. The Court concluded that, although awards to former employees for emotional distress would attach "additional consequences" to retaliatory employer conduct and could lead employer to alter the underlying conditions about which employees were complaining, *Ibid.*, such an effect would be "neither direct nor substantial enough" to warrant pre-emption. *Id.*, at 85, 110 S. Ct., at 2278.

In light of the recognized distinction in this Court's jurisprudence between direct state regulation and the indirect regulatory effects of common-law damages actions, it cannot be said that damages claims are clearly or unambiguously "requirements" or "prohibitions" imposed under state law. The plain language of the 1969 Act's modified pre-emption provision simply cannot bear the broad interpretation the Court would impart to it.

Justice Blackmun predicted the unneccessary and regrettable effect of pre-emption in cases such as *Easterwood, supra,* and *Mahony* "...there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies..." Citing *Rabin,* A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 869 (1992)."

And again, *Silkwood, supra,* as a reminder that the court has,

in the past, hesitated to find preemption of federal law provides no comparable remedy.

The FRSA and the CFR sections relied upon by the defendant railroad are, like the cigarette labeling and advertising act, "barren of alternative remedies."

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the Court grant the Writ of Certiorari to consider and resolve this important Federal and Constitutional question of preemption of the state common-laws speed requirement.

Respectfully Submitted,

Allison Ulin Lynch

Pamela R. O'Dwyer

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CERTIFICATE OF SERVICE

I, Pamela R. O'Dwyer, Counsel for Petitioner, herein and a Member of the Bar of the Supreme Court of the United States, hereby Certify that I have on this date served three true and correct copies of the foregoing Petition for Certiorari on Counsel for Respondent by placing same in the United States Mail with sufficient postage affixed thereto and addressed to the following:

Mr. Jack Senterfitt
Alston & Bird
One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309-3424

I further certify that all parties required to be served have been served this the 10 day of December, 1992.

Pamela R. O'Dwyer

Pamela R. O'Dwyer

Exhibit A

MAHONY v. CSX TRANSP., INC.

Robert MAHONY, as father and personal representative of Eve Mahony, in his own Behalf and as next of kin and for the use and Benefit of Eve Mahony's mother, Barbara Mahony, Plaintiffs–Appellants,

v.

CSX TRANSPORTATION, INC.,

Defendant–Appellee.

No. 90-9052

United States Court of Appeals,

Eleventh Circuit.

July 20, 1992.

Parents of pedestrian who was struck and killed by train brought wrongful death action against railroad. The United States District Court for the Northern District of Georgia, No. 4:88-cv-13HLM, Harold L. Murphy, J., found in favor of railroad. Parents appealed. The Court of Appeals held that: (1) parents' claim that railroad was negligent because train was allegedly

traveling too fast was preempted by federal law; (2) parents could not attempt to establish railroad's liability on basis of train's alleged excessive speed; and (3) parents' theory of liability relating to inadequacy of railroad grade crossing was not preempted by federal law.

Vacated and remanded with instructions.

Birch, Circuit Judge, filed a specially concurring opinion.

1. Railroads 372 (1)

States 18.21

Wrongful death plaintiffs' claim that railroad was negligent because train which struck their daughter was allegedly traveling too fast was preempted by federal regulations governing speeds at which trains can travel on particular classes of track.

2. Railroads 372 (1)

Because train that struck pedestrian was traveling below maximum speed allowed under federal law, pedestrian's parents could not attempt to establish railroad's liability for wrongful death on basis of train's alleged excessive speed.

3. **Railroads 362 (1)**

States 18.21

Wrongful death plaintiffs' theory of liability relating to inadequacy of railroad grade crossing at point where train struck pedestrian was not preempted by federal law.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, Circuit Judge, DYER, Senior Circuit Judge, and FULLAM (Honorable John P. Fullam, Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation), Senior District Judge.

PER CURIAM:

This diversity case involves a railroad accident. On January 23, 1987, Eve Mahony was walking along a road in rural Georgia when she entered a railroad crossing and was struck by an approaching train owned by defendant CSX Transportation, Inc. ("CSX"). Mahony's parents ("plaintiffs") sued CSX for wrongful death, alleging various theories of liability. Two of these theories — that CSX was negligent in operating the train at an excessive

speed and that CSX was negligent in failing to install adequate warning devices at the crossing — were dismissed by the district court prior to trial. The court reasoned that these two theories of recovery were preempted by federal law; therefore, the court ruled that evidence relating to these theories would be inadmissible at trial. The case was tried, the jury found in favor of CSX, and the plaintiffs have appealed that adverse judgment.

After the parties briefed this appeal, another panel of the Eleventh Circuit decided *Easterwood v. CSX Transportation, Inc.*, 933 F. 2d 1548 (11th Cir. 1991), cert. granted, — U.S. —, — S. Ct. —, — L.Ed.2d — (1992) (No. 91-790). In *Easterwood*, the panel fully explained the general preemptive effect of the Federal Railroad Safety act, 45 U.S.C. 421-445 (1988) (the "FRSA"). In particular, the court discussed whether the FRSA and related federal law preempted specific state law tort claims against railroads, including claims sounding in negligence for excessive speed and inadequate warning devices. *Easterwood* has substantially clarified the law governing Mahony's case. Given the preemption principles announced in *Easterwood*, our review of this case has convinced us that several of the district court's preemption rulings, and the judgment in favor of CSX which was

influenced by those rulings, are in error. Accordingly, we VACATE the judgment in favor of CSX and REMAND the case to the district court for further proceedings consistent with this opinion and with *Easterwood*.

[1,2] Without intending to expand upon the meaning of *Easterwood*, we note that at least two principles announced by that panel will have application to the present case on remand. First, the plaintiffs' claim that CSX was negligent because the train was allegedly traveling too fast is preempted by federal law. As stated in *Easterwood*, a theory "that [an] accident was caused because [a] train was traveling at a negligently high rate of speed" is preempted by specific federal regulations governing the speeds at which trains can ravel on particular classes of track. 933 F.2d at 1553. Because the CSX train that struck Mahony was traveling below the maximum speed allowed under federal law, the plaintiffs may not attempt to establish CSX's liability on the basis of the train's alleged excessive speed. *See Id.* at 1553-54.

[3] Second, the plaintiffs' theory of liability relating to the inadequacy of the railroad grade crossing (in particular, CSX failure to install automated warning devices at the crossing) is

not preempted by federal law. The *Easterwood* panel specifically noted that although the federal government was minimally involved in regulating the construction of safer railroad grade crossings, that involvement was not so substantial or specific as to preempt state tort suits based upon a railroad's failure to maintain a safe railroad crossing. See 933 F. 2d at 1554-55. Accordingly, in this case, the district court should not have dismissed the plaintiffs' claim that CSX negligently failed to install automated warning signals. (We are aware tht CSX has asserted that this portion of *Easterwood* was decided without the benefit of the citation of several applicable federal authorities. Notwithstanding these additional authorities, this panel is bound by the decision in *Easterwood*, CSX' arguments suggesting that *Easterwood* was wrongly decided are more appropriately addressed in a motion to rehear the present case *en banc*.)

We express no opinion on the merits of the numerous specific arguments pressed by the parties to this appeal. We hold only that the district court's judgment in favor of CSX cannot stand in light of *Easterwood*. Therefore, we VACATE that judgment and REMAND the case for further proceedings consistent with this opinion and *Easterwood*.

VACATED AND REMANDED WITH INSTRUCTIONS.

BIRCH, Circuit Judge, concurring specially:

I agree that we are bound by *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548 (11th Cir. 1991). I also agree that a fair reading of *Easterwood* means that the plaintiffs' excessive speed claim is preempted and that the plaintiffs' inadequate warning claim must survive. I therefore join the majority's opinion.

I write separately to note my dissatisfaction with *Easterwood*. By broadly preempting negligent speed claims and generally salvaging negligent failure to warn claims, I fear that the *Easterwood* panel may be stating the law backwards. Were I writing on a clean slate, I would recognize that, under appropriate circumstances, a plaintiff's excessive speed claim could survive, and a plaintiff's failure to warn claim might be preempted.

I.

In ruling that the speed regulations promulgated pursuant to the FRSA preempt, in a wholesale manner, any claim that a railroad company was negligent for operating its train at an excessive speed, the *Easterwood* panel fails to distinguish be-

tween the two types of negligence theories which might be brought. It seems to me that a wrongful death litigant could advance two district theories of a railroad's excessive speed liability. First, the plaintiff might argue that even though the train obeyed the federal speed limit, the railroad was negligent by exceeding the speed limit imposed by state law for that particular section of track. Second, the plaintiff might assert that even though the railroad obeyed the federal speed limit, the operator of the train was negligent for failing to slow down because under the circumstances, a reasonably prudent train operator would have exercised additional caution.

I believe that the first negligence theory is preempted by the FRSA, but the second is not. Preemption of the first theory simply respects the Supremacy Clause by recognizing that a railroad company should not be penalized for ignoring state operating procedures that have been intentionally trumped by specific federal legislation. Preemption of the second theory, however, goes far beyond respect for the Supremacy Clause, in that it effectively insulates a railroad from negligence liability for excessive speed as long as the railroad stays within the federal speed limits.

One hypothetical can demonstrate that this last result is unwarranted. Suppose the train that struck Mahony was traveling at 59 miles per hour, at night, in a dense fog, and during a stiff rain. If 60 miles per hour was allowed by federal law, CSX could not be sued for negligently excessive speed, even though the train's speed under these circumstances might be clearly unreasonable. To the extent that *Easterwood* prevents a plaintiff from asserting this second theory of excessive speed liability, I respectfully disagree with the opinion. Ordinarily, "[c]ompliance with a legislative enactment...[should] not prevent a finding of negligence where a reasonable [person] would [have taken] additional precautions." Restatement (Second) of Torts § 288C (1965).

II.

Turning to the federal preemption of tort claims based upon a railroad's failure to warn, it seems to me that the applicable federal law — the FRSA, its accompanying federal regulations, and the Manual on Uniform Traffic Control Devices for Streets and Highways — requires state and local transportation authorities to make the decisions about the warning devices needed at

particular crossings. *See Hatfield v. Burlington Northern R.R.*, 958 F.2d 320 (10th Cir. 1992). When these governmental authorities have made the safety decisions about a certain crossing, it seems odd to hold a railroad responsible in common law negligence for failing to override the governmental decisions. Indeed, allowing negligence liability to be imposed upon railroads in this manner could defeat the legislature's desire for uniformity in the area of railroad warning devices. Fearing potential liability, railroads may attempt to reach independent decisions on waring devices, notwithstanding the conclusions of those governmental agencies entrusted with the decisionmaking authority under federal law.

For this reason, I believe that a plaintiff's claim that a railroad negligently failed to install adequate warning devices can be preempted, as long as the governmental authority with jurisdiction over the applicable crossing reached a decision regarding the appropriate warning devices needed at that crossing. Under such circumstances, federal preemption is sensible because it seems unfair to hold a railroad accountable for the warning decisions made by other entities. In reaching this conclusion, I appear to be supported not only by the decision of the Tenth

Circuit in *Hatfield*, but also by then-Judge Kennedy's opinion in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983). *See Id.* at 1154 (suggesting that federal preemption attaches when "a federal decision is reached through the local agency on the adequacy of the warning devices at the crossing").

III.

In sum, the fairest reading of *Easterwood* indicates that the FRSA preempts a plaintiff's excessive speed claim but not a plaintiff's failure to warn claim. I agree that we are bound by *Easterwood*, even though reasonable arguments can be made that would limit *Easterwood's* applicability to the present case. Therefore, I join the majority's opinion. However, the reservations I have outlined above are substantial, perhaps significant enough to justify a rehearing *en banc*.

Adm. Office, U.S. Courts — West Publishing Company,
Saint Paul, Minn.

Exhibit B

United States District Court

Northern District of Georgia

ROBERT MAHONY and
BARBARA MAHONY

JUDGMENT
IN A CIVIL CASE
CASE NUMBER: 4:88-CV-13-HLM

V.

CSX TRANSPORTATION, INC.

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heardand a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits, and that the

Defendant, CSX Transportation, Inc., recover of the Plaintiffs, Robert Mahony and Barbara Mahony, its costs of action.

September 20, 1992	Luther D. Thomas
Date	Clerk
	/S/
	(By) Deputy Clerk

Exhibit C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-9052

ROBERT MAHONY, as father and personal representative of EVE MAHONY, in his own behalf and as next of kin and for the use and a benefit of Eve Mahony's mother, BARBARA MAHONY,

Plaintiffs-Appellants,

versus

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the

Northern District of Georgia

O R D E R:

( ) The motion of Appellee, for (XX) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of Appellee, for (XX) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including December 14, 1992, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____ _____ under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ , for a further stay of the issuance of the mandate is DENIED.

/S/

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

SALLY CARSON,	)	CV 89-0-513
	)	
Plaintiff,	)	MEMORANDUM
	)	AND ORDER
vs.	)	
	)	
BURLINGTON NORTHERN RAILROAD COMPANY,	)	
	)	
Defendant.	)	

Presented to me is the defendant's motion for summary judgment (filing 43). I have considered the briefs and evidence submitted by both parties.

I. BACKGROUND

This case involves an accident at a railroad crossing involving a train operated by the defendant and a driver of an automobile, the plaintiff.

The defendant moves for summary judgment (filing 43) regarding the following allegations of liability which are set forth in paragraph three of the complaint (filing 1): 1) operating its train at excessive speed considering the then existing conditions;

2) failing to provide adequate crossing protection, including guards, arms, lights and stop signs at the crossing; 3) maintaining an ultrahazardous crossing; 4) failing to evaluate, inspect and determine the nature and degree of the alleged hazard at the crossing; 5) failing to establish and perform any corrective or preventive safety measures or methods when the defendant allegedly knew of the allegedly hazardous crossing; and 6) failing to sound adequate warning signals at the train's approach. These allegations, for purposes of the motion before me, can be summarized in three categories: 1) crossing protection equipment; 2) speed; and 3) audible warning devices.

II. LAW

A. STANDARD

Summary judgment should be granted "only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is an extreme and treacherous device, which should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for

controversy, and unless the other party is not entitled to recover under any discernible circumstance. Vette Co. v. Aetna Casualty & Surety Co., 612 F. 2d 1076, 1077 (8th Cir. 1980). In passing upon a motion for summary judgment, the district court must view the facts in the light most favorable to the party opposing the motion. Id. Even if the district court is convinced that the moving party is entitled to judgment, the exercise of sound judicial discretion may dictate that the motion should be denied, in order that the case can be fully developed at trial. McLain v. Meier, 612 F. 2d 349, 356 (8th Cir. 1979).

Essentially the test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). And, although under Federal Rule of Civil Procedure 56 due deference must be given to the rights of litigants to have their claims adjudicated by the appropriate finder of fact, equal deference must be given under Rule 56 to the rights of those defending against such claims to have a just, speedy and inexpensive determination of the action where the claims have no factual basis. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

B. DISCUSSION

Under the supremacy clause of the United States Constitution, **U.S. Const.**, art. VI, cl. 2, federal law may preempt and supersede state law, **California Fed. Sav. & Loan Ass'n v. Guerra**, 479 U.S. 272, 280 (1987), which includes both state legislative law and common law. **San Diego Bldg. Trades Council v. Garmon**, 359 U.S. 236, 247 (1959).

Federal law may supersede state law in several ways. First, federal law may preempt state law where Congress is expressly empowered to do so. Second, upon a review of Congressional intent in a particular area of law, preemption may be inferred where the federal scheme of regulation is sufficiently comprehensive to determine that Congress left "no room" for supplementary state regulation. Third, preemption may be found when the federal law is in actual conflict with state law; in other words, compliance with both federal and state law is impossible or compliance with state law would be "an obstacle to the accomplishment and objectives of Congress." **Louisiana Pub. Serv. Comm'n v. FCC**, 476 U.S. 355, 358-69 (1986). It is the second manner of preemption which is relevant to the issues now before the court.

The issues before me now are whether the Federal Rail-

road Safety Act ("FRSA"), 45 U.S.C. § 421, **et seg.**, the Federal-Aid Highway Act ("FAHA"), 23 U.S.C. § 101, **et seq.**, and the Locomotive Boiler Inspection Act, 45 U.S.C. § 22, **et seq.**, together with application federal regulations, preempt the plaintiff's state common law claims set forth in section I of this memorandum and order.

Regarding the FRSA, its primary purposes are to promote safety in all areas of railroad operation and to reduce railroad accidents. H.R. 91-1194, 91st Cong., 2d Sess., **reprinted in 1970 U.S. Code Cong. & Admin. News**, 4104, 4104. National uniformity of safety regulations was one Congressional objective. **Id.** at 4109, 4116-17. The Federal Railroad Safety Act provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

Section 434 essentially encompasses two inquiries: (1) a determination of whether the precise subject matter has been addressed by federal regulations; and (2) if so, whether state law can nevertheless prevail under what is generally referred to as the "local safety hazard exception." **Donelon v. New Orleans Terminal Co.**, 474 F. 2d 1108 (5th Cir.), **cert. denied**, 414 U.S. 855 (1973).

In other words, under the local safety hazard exception to section 434, if federal regulations cover the subject matter, state law is preempted unless the state establishes that contrary regulations are required for remedying local safety concerns. Standing to enforce the local safety hazard exception is vested exclusively in the state; in other words, local municipalities and private individuals may not assert this exception. **Id.** at 1112.

Regarding the FAHA, that Act imposes conditions on states for receipt of federal highway funds. Amendments have placed the obligation of regulation the safety of railroad crossings on the states. 23 U.S.C. §§ 101 & 130.

Regarding the Locomotive Boiler Inspection Act, the relevant provisions of that Act are discussed in section II (B) (3) of this memorandum and order.

(1) CROSSING PROTECTION EQUIPMENT

In arguing that federal law preempts the plaintiff's common law claims regarding traffic control or warning devices, the defendant asserts: (1) Nebraska has accepted, in exchange for federal highway funding, the obligations of implementing through its regulatory agencies the Secretary of Transportation's program for improving grade crossings; (2) the Nebraska Department of Roads had, before the accident in question, investigated the crossing at issue and began the procedure of acquiring additional crossing protection warning devices at the crossing in question; and therefore (3) the duty to install adequate crossing protection warning devices shifted from the railroad to the state.

Karl v. Burlington Northern Ry., 880 F. 2d 68 (8th Cir. 1989) involved a railroad intersection collision. **Id.** at 69. The defendant railroad argued that it did not have a duty to upgrade its traffic control and warning devices and that the plaintiff therefore could not recover under that theory of negligence. The defendant argued that the FRSA and the FAHA preempted any claims of common law negligence based on the inadequacy of the warning devices at the crossing. The defendant then argued that as federal law grants to the Secretary of Transportation the

power to authorize a local agency to regulate grade crossings, and since the local agency approved certain warning devices, that such approval preempted any common law negligence claims. **Id.** at 75-76.

The Eighth Circuit determined that the plaintiff's negligence claim was not preempted by federal law for two reasons. First, the situation was not one of actual conflict between federal and state laws. Second, the court stated:

> Additionally, Burlington Northern can point to no case law or legislative history to support the theory that Congress intended to completely occupy the field of railroad safety governance. Our conclusion is supported by Runkle v. Burlington N., 188 Mont. 286, 299-300, 613 P. 2d 982, 990-91 (1980), where Burlington Northern made a similar preemption argument with regard to the Federal-Aid Highway Act of 1973. The court held that the Act represents an effort by the federal government to improve the safety of grade crossings, but that it does not lessen the statutory or common law duty of a railroad to maintain a good and safe crossing. *Id.* Similarly, in Marshall v. Burlington N., Inc., 720 F. 2d 1149, 1153 (9th Cir. 1983), the court held that the Railroad Safety Act did not occupy the field of railroad safety governance. We conclude that Karl's negligence claim is not preempted by federal law.

Id. at 76.

Acknowledging the Eighth Circuit's ruling in **Karl**, I find that the plaintiff's common law claims regarding crossing pro-

tection warning devices[1] are not preempted by federal law. Therefore, insofar as these claims are concerned, the defendant's motion for summary judgment is denied.

(2) SPEED

The defendant argues that because specific regulations regarding train speed have been promulgated, the FRSA preempts the plaintiff's common law negligence claim reguarding the speed of the train at the time of the accident in question.

49 C.F.R. § 213.9 sets forth "maximum allowable operating speeds" for trains, taking into consideration varying conditions of track. 49 C.F.R. § 213.9 (1989).

49 C.F.R. § 213.1 states that subpart A, which includes 213.9 setting maximum allowable operating speeds, "prescribes initial minimum safety requirements" for track which is part of "the general railroad system of transportation." 49 C.F.R. § 213.1 (1989). Section 213.1 also provides that "a combination of track conditions, none of which amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track." **Id.** It is therefore clear that maximum allowable speed limits as set forth in § 213.9 for

[1] These claims are numbered 2,3,4 and 5 as set forth in section I of this memorandum and order.

general railroad operation is not necessarily safe speed limits and were not intended to be interpreted as such.

There is no precedent or reason why the defendant should not be subjected, if appropriate, to common law liability for operating its train at an excessive speed taking into consideration then existing conditions. **See Craig v. Chicago, St. Paul, M & O. Ry.**, 97 Neb. 426, 432-33, 150 N.W. 374, 377-78 (1914) (stating, in a case not involving a municipal ordinance regarding train speed, that railroad companies are required to exercise a level of ordinary care commensurate with the probability of danger).

I therefore find that federal law has not preempted at plaintiff's claim[2] regarding the operation of the train at an allegedly excessive speed considering then existing conditions. Therefore, insofar as this issue is concerned, the defendant's motion for summary judgment is denied.

(3) AUDIBLE WARNING DEVICE

The defendant's argument regarding the sound level of the audible warning device[3] used is similar to the preemption

---

[2] This claim is numbered 1 as set forth in section I of this memorandum and order.

[3] The audible warning device presently at issue is the horn used on the train at the time of the accident in question.

argument described in section II (B) (2) above. The defendant asserts that the Locomotive Boiler Inspection Act ("Locomotive Inspection Act"), 45 U.S.C. § 22, **et seq.**, preempts the plaintiff's claim regarding the adequacy of the sound level of the horn.

The Locomotive Inspection Act provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said **locomotive... and all parts and appurtenances thereof** are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive... and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions... of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S. C. § 23 (emphasis added).

A horn is considered to be a part or appurtenance and therefore is governed by the Locomotive Inspection Act. **Scott v. Chicago, Rock Island & Pac. Ry.**, 197 F. 2d 259, 261 (8th Cir. 1952). **See Herold v. Burlington N., Inc.**, 761 F. 2d 1241, 1246-47 (8th Cir.), **cert. denied**, 474 U.S. 888 (1985).

Applied to this case, the defendant asserts that because the Locomotive Inspection Act covers the horn in question as a

"part" or "appurtenance" of the train, that the plaintiff's common law claim of negligence regarding the adequate sound level of this device is preempted. I agree.

In setting minimum levels of sound required for audible warning devices, 49 C.F.R. § 229.129 (a) provides that such minimum level shall be "96db (A) at one hundred feet forward of the locomotive in its direction of travel." 49 C.F.R. § 229.129 (a) (1989). 49 C.F.R. § 229.1 also states that the level prescribed is the "minimum [f]ederal safety" standard for audible warning devices.

In **Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n**, 536 F. Supp. 653 (E.D. Pa. 1982), the court held that federal law and regulations preempted a state statute. **Id.** at 657. The Locomotive Inspection Act required speedometers (speed indicators) and ~~did not~~ require speed recorders; the applicable state statute, however, required speed recorders as well as speed indicators. **Id.** at 654 & n.1. In resolving the issue of whether the Locomotive Inspection Act's preemptive purpose was modified by § 434 of the FRSA, the court determined that the Locomotive Inspection Act totally occupies the field of locomotive equipment as that equipment relates to safety and therefore preempts state regulation of such equipment, and the Locomotive Inspection

Act's preemptive purpose was not modified by the passage of § 434 of the FRSA. **Id.** at 655-57.

The standard established by federal regulation for the sound level of an audible warning device, in this case a horn, is a minimum safety standard to be enforced for a specific piece of equipment. The required minimum safety standard was set out in scientifically measurable terms, and the applicable federal regulations do not allow for discretion on the part of the operator. Unlike 49 C.F.R. § 213.1 which provides that an operator may need to take remedial action in determining the proper speed depending on existing conditions, there is no regulation which requires and operator to assess existing conditions and correspondingly alter the sound level of a horn. In other words, in contrasting the horn argument with the speed argument discussed in section II (B) (2) of this memorandum and order, the federal regulations regarding speed set forth maximum allowable speeds, not necessarily safe speeds as noted by the regulations themselves in that they provided for operator discretion depending on track conditions.

Therefore, the defendant's motion is granted only insofar as it relates to the sound level of the horn on the train in question used at the time of the accident. This ruling, however, does not

address the issue of whether additional warning signals should have been sounded.

III. SUMMARY

The defendant's motion for summary judgment is granted only insofar as it relates to the sound level of the audible warning device (horn) used on the train in question at the time of the accident. This ruling, however, does not address the issue of whether additional warning signals should have been sounded. The motion is denied insofar as it relates to crossing protection equipment and the speed of the train.

IT IS ORDERED that the defendant's motion for summary judgment (filing 43) is granted only insofar as it relates to the sound level of the audible warning device used on the train at the time of the accident, and the motion is otherwise denied.

DATED this 27th day of June, 1990.

BY THE COURT:

/S/

Richard G. Kopf

United States Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

RODNEY DUESTER, et al.,	)	CV 89-0513
	)	
Plaintiff,	)	MEMORANDUM
	)	OPINION
vs.	)	AND ORDER
	)	
BURLINGTON NORTHERN RAILROAD COMPANY,	)	
	)	
Defendant.	)	

This matter is before the court on the defendant's motion for summary judgment (Filing No. 38). The court has considered the briefs submitted by the parties. Regarding the evidence which has been submitted, the court has considered all evidence with the exception of the deposition excerpts. Such excerpts consist merely of xeroxed portions of depositions which have not been properly authenticated in accordance with Local Rule of Practice 20 (A) (2).

I. FACTUAL BACKGROUND

This case regards an accident at a railroad crossing involving a train operated by the defendant and a cement truck

owned by the plaintiff Rector Redi Mix Concrete Company ("Redi Mix") and driven by plaintiff Rodney W. Duester, an employee of Redi Mix.

The defendant moves for summary judgment, arguing that the plaintiff's common law claims of negligence against the railroad are preempted by federal law and therefore that Nebraska statutory law does not permit a finding of liability on these claims. The defendant asserts that as the evidence shows that Burlington Northern complied with all federal and state laws regarding crossing protection equipment and speed, the defendant is entitled to partial summary judgment on those issues of negligence.

II. STANDARD OF REVIEW

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party should prevail as a matter of law. FED. R. CIV. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56 (e). However, the opposing party must be

given the benefit of all favorable factual inferences and summary judgment cannot be granted when the non-movant shows that an allegedly undisputed fact actually presents a triable issue. Holloway v. Lockhart, 813 F. 2d 874, 878 (8th Cir. 1987).

III. DISCUSSION

Under the supremacy clause of the United States Constitution, U.S. Const., art. VI, cl. 2, federal law may preempt and supersede state law, California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987), which includes both state legislative law and common law. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

Federal law may supersede state law in several ways. First, federal law may preempt state law where Congress is expressly empowered to do so. Second, upon a review of Congressional intent in a particular area of law, preemption may be inferred where the federal scheme of regulation is sufficiently comprehensive to determine that Congress left "no room" for supplementary state regulation. Third, preemption may be found when the federal law is in actual conflict with state law; in other words, compliance with both federal and state law is impossible or compliance with state law would be "an obstacle

to the accomplishment and objectives for Congress." Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 358-69 (1986). It is the second manner of preemption which is relevant to the issues now before the court.

The issues presented by the parties to the undersigned are whether the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421, et seq., and the Federal Aid Highway Act ("FAHA"), 23 U.S.C. § 101, et. seq., together with applicable federal regulations, preempt the plaintiate common law claims of negligence relating to crossing protection equipment and speed.

Regarding the FRSA, its primary purposes are to promote safety in all areas of railroad operation and to reduce railroad accidents. H.R. 91-1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News, 4104, 4104. National uniformity of safety regulations was on Congressional objective. Id. at 4109, 4116-17. The Federal Railroad Safety Act provides:

> The Congress declares that laws, rules, regulations, orders, and standards, relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule,

regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

Section 434 essentially encompasses two inquiries: (1) a determination of whether the precise subject matter has been addressed by federal regulations; and (2) if so, whether state law can nevertheless prevail under what is generally referred to as "local safety hazard exception." Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir.), cert. denied, 414 U.S. 855 (1973).

In other words, under the local safety hazard exception to section 434, if federal regulations cover the subject matter, state law is preempted unless the state establishes that contrary regulations are required for remedying local safety concerns. Standing to enforce the local safety hazard exception is vested exclusively in the state; in other words, local municipalities and private individuals may not assert this exception. Id. at 1112.

Regarding the FAHA, that Act imposes conditions on states for receipt of federal highway funds. Amendments have placed the obligation of regulating the safety of railroad crossings on the states. 23 U.S.C. §§ 101 & 130.

A. CROSSING PROTECTION EQUIPMENT

In Karl v. Burlington Northern Ry., 880 F.2d 68 (8th Cir. 1989), The Eighth Circuit Court of Appeals determined that the plaintiff's negligence claim relating to crossing protection equipment was not preempted by federal law for two reasons. First, the situation was not one of actual conflict between federal and state laws. Second, the court stated:

> Additionally, Burlington Northern can point to no case law or legislative history to support the theory that Congress intended to completely occupy the field of railroad safety governance. Our conclusion is supported by Runkle v. Burlington N., 188 Mont. 286, 299-300, 613 P.2d 982, 990-91 (1980), where Burlington Northern made a similar preemption argument with regard to the Federal-Aid Highway Act of 1973. The court held that the Act represents an effort by the federal government to improve the safety of grade crossings, but that it does not lessen the statutory or common law duty of a railroad to maintain a good and safe crossing. Id. Similarly, in Marshall v. Burlington N., Inc., 720 F.2d 1149, 1153 (9th Cir. 1983), the court held that the Railroad Safety Act did not occupy the field of railroad safety governance. We conclude that Karl's negligence claim is not preempted by federal law.

Id. at 76.

The defendant argues that Karl is an aberration as the Eighth Circuit "was not presented" with relevant legislative history and therefore the Circuit decided that case on an "incom-

plete record." Defendant's Brief in Support of Defendant's Motion for Summary Judgment [hereinafter Defendant's Brief] at 24-25. Merely because the parties did not present the legislative history to the Eighth Circuit does not in any way imply that the Circuit decided Karl on an "incomplete record" or that the Circuit lacked the "ablility to review the relevant legislative history," as argued by the defendant in this case. Id. The defendant has not presented to this court any persuasive authority which supports its position.

Therefore, in accordance with Karl, the plaintiff's common law claims regarding crossing protection warning devices are not preempted by federal law. Id.; Carson v. Burlington N. Ry., No. CV 89-0-513 (D. Neb. June 27, 1990) (memorandum and order stating that federal law does not preempt common law claims regarding railroad crossing protection equipment).

The court declines to consider the issue of whether the defendant complied with relevant laws, as the issue has not been briefed and the record is at this point insufficient to enable the court to decide this issue.

Therefore, the court finds that the defendant's motion for summary judgment should be denied regarding the plaintiff's negligence claim with respect to crossing protection equipment.

B. SPEED

The parties agree that federal law preempts state law on the issue of maximum speed limits for trains. Defendant's Brief at 32-36; Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment [hereinafter Plaintiff's Brief] at 23. The plaintiff asserts, however, that "the railroad does not have the right to barrel through known dangers or dangerous circumstances at full speed," and that a train "must, under the circumstances of an unusually dangerous crossing, slow down." Plaintiff's Brief at 23.

It has been specifically determined that the FRSA has specifically preempted state statutory or common law with regard to train speed limits. Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1554 (11th Cir. 1991). 49 C.F.R. § 213.9 (1990) sets out the maximum allowable speed limits for trains. 49 C.F.R. 213.1 states that subpart A, which includes § 213.9, "prescribes initial minimum safety requirements" for track which is part of "the general railroad system of transportation." 49 C.F.R. 213.1 (1990). Section 213.1 also provides that "a combination of track conditions, none of which amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track." Id. It is therefore clear that

maximum allowable speed limits as set forth in § 213.9 for general railroad operation are not necessarily safe speed limits and were not intended to be interpreted as such.

Therefore, the defendant's motion for summary judgment is denied in that the plaintiff is entitled to proceed with his claim relating to the speed of the train operated by the defendant.

IT IS ORDERED that the defendant's motion for summary judgment (Filing No. 38) is denied.

DATED this 1st day of November, 1991.

BY THE COURT:

/S/

William G. Cambridge

United States District Judge